

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6080

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, ET AL.,

Defendants,

and

FUQUA INDUSTRIES, INC.,

Proposed-Intervenor-Appellant.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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QUESTIONS PRESENTED

1. Whether the district court correctly denied Fuqua's motion to intervene as of right in this government antitrust suit when Fuqua asserted no "interest" except a desire to purchase the stock of the company to be divested.
2. Whether the district court correctly denied Fuqua's motion for permissive intervention.

FEDERAL RULES INVOLVED

Rule 24(a), F.R. Civ. P., provides:

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(b), F.R. Civ. P., provides:

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT

Fuqua Industries, Incorporated ("Fuqua") appeals from the district court's denial of its motion to intervene in this government antitrust suit.

The United States on August 1, 1969, sued the International Telephone & Telegraph Corporation ("ITT") and the Hartford Fire Insurance Company ("Hartford") in the district court in Connecticut, charging that the proposed merger of the two companies would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The suit was a companion to another Section 7 suit filed the same day in the same court challenging ITT's proposed merger with Grinnell corporation, and followed by a few months a Section 7 suit in Illinois contesting the ITT acquisition of Canteen Corporation. On October 30, 1969, the district court denied the government's motion for a preliminary injunction to block the ITT-Hartford merger, which took place in 1969.

After the government losses in the ITT-Grinnell and ITT-Canteen cases, the United States and ITT negotiated consent judgments settling those suits as well as the ITT-Hartford case, which was awaiting trial. On September 24, 1971, the district court in Connecticut entered a consent

judgment in the Hartford case. 1/ The judgment required ITT within three years to divest itself of either Hartford or of the combination of Avis and three other properties. 2/ The judgment further provided that if ITT did not make a timely divestiture, the court would appoint a trustee to manage and dispose of the properties subject to court supervision.

ITT failed to divest itself of all of its interest in Avis, and the district court on January 6, 1975, appointed Richard Joyce Smith as trustee to manage and dispose of ITT's undivested interest in Avis. Pursuant to Trustee Order No. 3, dated January 14, 1976 (App. 91a, 94a), the trustee began a program of public offerings with the sale of 1,250,000 shares of Avis common stock on May 27, 1976.

On May 17, 1977, Fuqua, which wishes to acquire Avis, offered to buy the remaining stock held by the trustee for \$15.50 per share (App. 27a). The trustee by letter dated May 18, 1977, refused to consider the offer (App. 102a). On May 18, 1977, Fuqua moved to intervene in the antitrust case. It claimed that it wished to purchase privately the

1/ On the same day, consent judgments were entered in the Grinnell case and the Canteen case. All the judgments, which are effective for ten years, were negotiated together.

2/ The three other properties are: ITT Life Insurance Company of New York, Hamilton Life Insurance Company, and Levitt and Sons.

Avis stock held by the trustee and sought to have the district court enjoin the annual shareholder meeting and amend Trustee Order No. 3 to allow sale of the stock to Fuqua (App. 17a). 3/ The district court on May 23, 1977, held a hearing, after which it issued an opinion denying Fuqua's motion (App. 249a). The court ruled that Fuqua had no right to intervene under Rule 24(a)(2) and that it had not met the requirements for permissive intervention under Rule 24(b)(2) (App. 266a - 268a). Fuqua appealed, and on May 24, 1977, this Court denied Fuqua's stay motion but granted its request for an expedited appeal. 4/

On June 6, 1977, Norton-Simon, Inc. offered to purchase the Avis stock held by the trustee. Norton-Simon's offer will remain in effect until June 22, 1977. We have been advised that a hearing will be held in the district court on June 15, 1977 at which time the trustee will seek instructions from the court as to how to proceed in light of the Norton-Simon offer.

3/ On the same day, Fuqua's vice-president, Robert Prather, represented by the same counsel as Fuqua, filed an action to block the shareholders' meeting on grounds of alleged violation of the securities law. The district court also denied Prather's request for injunctive relief. (App. 263a - 265a).

4/ The shareholder meeting took place as scheduled on May 25, 1977, and the proposals to which Fuqua objected were passed.

ARGUMENT

Introduction

Courts for years have rejected the efforts of private parties to intervene in government antitrust cases, whether they sought intervention to advance their concept of the public interest, or merely to promote their own private interests. United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Cal., 1967), affirmed as Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1969); United States v. Automobile Manufacturers Association, 307 F. Supp. 617 (C.D. Cal. 1969), affirmed as City of New York v. United States, 397 U.S. 248 (1970); United States v. International Telephone & Telegraph Corp., 349 F. Supp. 22 (D. Conn., 1972), affirmed as Nader v. United States, 410 U.S. 919 (1973); United States v. Associated Milk Producers, 394 F. Supp. 29 (W.D. Mo., 1975), affirmed, 534 F. 2d 113 (C.A. 8), certiorari denied, as National Farmers Organization v. United States, 50 L. Ed 2d 309 (1976). The decisions have indicated an appreciation of the importance of swift, effective government enforcement of the antitrust laws and the need to insure that such enforcement is not hindered by the efforts of private parties to use public law enforcement as a vehicle for advancement of their private concerns. - See, e.g., United States v. Paramount Pictures, 1971 Trade Cases ¶ 73,526 (S.D.N.Y., 1971), affirmed as Syufy Enterprises v. United States, 404 U.S. 802 (1972); cf. Donaldson v. United States, 400 U.S. 517 (1970).

In the present case Fuqua makes no pretense of concern with the public interest. It claims as an interest only its desire to purchase the Avis stock held by the trustee. Such desire, which Fuqua does not contend is an interest "of a 'legal' or 'equitable' nature" (Fuqua Br., 32) would not support intervention of right in ordinary civil litigation between private parties. The district court was certainly correct in holding that it does not justify intervention in a government antitrust action.

I. THE DISTRICT COURT CORRECTLY HELD THAT FUQUA WAS NOT ENTITLED TO INTERVENE OF RIGHT

Rule 24(a)(2) authorizes a person to intervene as of right if:

- (1) the applicant has an interest relating to the property or transaction which is the subject matter of the action;
- (2) the applicant is so situated that the disposition of the action will adversely affect his ability to protect his interest;
- (3) the applicant's interest is not adequately represented by existing parties; and
- (4) the application is timely.

The district court properly held that Fuqua did not meet these criteria.

A. Fuqua Has No Interest Within The Meaning Of Rule 24(a)(2)

The Supreme Court has held that intervention will be allowed only where the applicant has a "significantly pro-

protectable interest." Donaldson v. United States, supra. This particularization of Rule 24's more general word "interest" by the phrase "significantly protectable" reflects the general law on the subject. Thus the applicant for intervention must assert a "substantial" personal interest in the outcome of the suit which lies "at the center of the controversy." United States v. CIBA Corp., 50 F.R.D. 507, 513 (S.D.N.Y., 1970). A party seeking intervention "must have some substantial legal interest to protect by his intervention." Greene v. Verven, 203 F. Supp. 607, 610 (D. Conn., 1962). Accord, Vazman, S.A. v. Fidelity International Bank, 418 F. Supp. 1084 (S.D.N.Y., 1976); In re Penn Central Commercial Paper Litigation, 62 F.R.D. 341 (S.D.N.Y., 1974), affirmed as Shulman v. Goldman Sachs & Co., 515 F. 2d 505 (C.A. 2 1975); Kheel v. American Steamship Owners Association, 45 F.R.D. 281 (S.D.N.Y., 1968).

Fuqua's alleged "interest" in the government's anti-trust case is that it would like to purchase the trustee's stock and take over Avis. See Fuqua Br., 23. Fuqua claims no right, legal or equitable, to do so. Fuqua Br., 32. Thus the district court correctly described Fuqua as a "mere potential purchaser" of Avis stock and a stranger to the proceedings (App. 266a). To our knowledge, no one has ever attempted to intervene, let alone succeeded, in a government antitrust suit on such a tenuous basis, and thus there is no antitrust precedent exactly on point. There is, however, squarely applicable precedent from private civil litigation

which establishes that a would-be purchaser like Fuqua lacks the interest to justify intervention. Old Colony Trust Co. v. Penrose Industries Corp., 387 F. 2d 939 (C.A. 3), certiorari denied, 392 U.S. 927 (1968). In Old Colony the court held that a person who wished to purchase stock held by a trustee as pledged collateral had no interest justifying intervention in the trustee's action against the pledgor for court approval of the sale of the collateral. The court emphasized that "[a]ppellants' status as would-be purchasers does not clothe them in this type of proceeding with the type of 'interest' which entitles them to intervene in this action for the purpose sought by them." Id. at 941. Although Fuqua claims that Old Colony "was decided incorrectly" (Fuqua Br., 33), the decision is directly in the main stream of relevant precedent. 5/ See cases cited at p.6, above.

5/ Fuqua's alternative argument that Old Colony is distinguishable, because the trustee there was obligated only to make a "commercially reasonable sale" whereas the Avis trustee is obliged to make the "most advantageous sale" of Avis stock (Fuqua Br., 34), is unpersuasive. The Avis trustee is obliged by the final judgment and the trustee orders to effect a speedy divestiture of Avis as a viable and independent rental car competitor. Competition, not price, is the guiding consideration for the trustee, and he is under no greater duty to be concerned with price than the trustee was in Old Colony. To the extent that he is concerned with price, however, Fuqua faces the additional problem that Norton Simon Inc., a rival to acquire Avis, has made an offer for the trustee's stock which exceeds Fuqua's.

Antitrust precedent also establishes that even if Fuqua had the stronger claim of being a private antitrust plaintiff seeking to advance its own antitrust suit, rather than being a potential stock purchaser, it would have no interest warranting intervention. Congress has specifically authorized private antitrust actions (15 U.S.C. 18), and in doing so its purpose "was not merely to provide relief, but was to serve as well the high office of enforcing the antitrust laws." Zenith Corp. v. Hazeltine, 395 U.S. 100, 130-131 (1969). Nonetheless, private antitrust plaintiffs may not intervene in government antitrust suits to help their own litigation, for they "do not have an interest cognizable under Rule 24(a). . . ." United States v. Automobile Manufacturers Association, supra, at 619. Since private antitrust plaintiffs seeking to advance private litigation which Congress has endorsed lack an interest sufficient for intervention, Fuqua's claim to intervene based only on a wish to buy stock is plainly groundless.

Fuqua's chief reliance is upon Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967) (Fuqua Br., 27-29). This reliance is misplaced. In Cascade the Supreme Court held that intervention of right in a government antitrust case by certain outsiders was proper in proceedings on remand from the Court where the government had "knuckled under" to El Paso and had failed to carry out the Court's

mandate for "divestiture without delay." Id. at 136. The Supreme Court has repeatedly affirmed district court decisions which construe Cascade as allowing intervention only to insure compliance with the Court's earlier mandate. United States v. Blue Chip Stamp Co., supra; United States v. Western Electric Co., 1968 Trade Cases ¶ 72,415 (D.N.J. 1968), affirmed as Clark Walter & Sons, Inc. v. United States, 392 U.S. 659 (1968); United States v. Paramount Pictures, supra. 6/ In the present case, of course, there is no issue of compliance with the mandate of a court or of government knuckling under. Moreover, the interest successfully advanced by the intervenors in Cascade was "part of the public interest in a competitive system. . . ." Id. at 135. Fuqua has no comparable interest in competition -- only a wish to enlarge itself by buying Avis.

The other cases relied on by Fuqua (Fuqua Br., 29-32) do not support its claim to intervene. None of the cases involved an asserted interest as insubstantial and as remote

6/ Professor Wright summarized the law as being that: ". . . Cascade stands virtually alone, and . . . the usual rule, both before Cascade and after, has been that private parties will not be allowed to intervene in government antitrust litigation." 7A Wright and Miller, Federal Practice 499. Subsequent to Professor Wright's summary, the Supreme Court refused to review a court of appeals decision which similarly interpreted Cascade. United States v. Associated Milk Producers, supra.

as a desire to buy stock; none of the cases involved an effort to intervene in a government antitrust suit. 7/

7/ Appellant's reliance on Hobson v. Hansen, 44 F.R.D. 18 (D.D.C. 1968), affirmed as Smuck v. Hobson, 408 F. 2d 175 (C.A.D.C. 1969), is puzzling, for there the court stressed that "required for intervention is a direct, substantial, legally protectable interest in the proceedings" (id. at 24) and stated that a former school superintendent, a school board member, and several dissatisfied parents of school children had no interest meriting intervention in a school desegregation suit. In Smuck v. Hobson, supra, the court of appeals summarily rejected the claims of the former superintendent and the school board member; it held that the parents of children in the school system affected by the desegregation order had an interest justifying intervention. Fuqua's desire to buy stock is not comparable to the interest of parents in a school desegregation order involving their children. In Nuesse v. Camp, 385 F. 2d 694 (C.A.D.C. 1967), intervention was allowed to a state banking commissioner in a case where the state's policy concerning branch banking was "the core of the federal statute" under which the litigation was being conducted. Id. at 701. In the present case, by contrast, the "core" of the antitrust suit is competition, a matter not even remotely of concern to Fuqua. Finally, the intervention allowed in United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972) was not only to persons whose well being was far more intimately affected than Fuqua's, but whose intervention came under a unique statute which the court described as making "a reviewing court more of an administrative tribunal than a court in an ordinary adversary civil case." Id. at 413.

B. Even if Fuqua's Desire To Buy The Trustee's Avis Stock Were An Interest Cognizable Under Rule 24, Denial Of Intervention Would Not Impair Its Ability To Protect It

We think that for the reasons stated above, the district court correctly held that Fuqua has no protectable interest. The district court thus had no need to address the question of impairment of ability to protect a non-existent interest, nor does this Court. Nonetheless, even if it could be said that Fuqua's desire to buy the trustee's stock in order to obtain control of Avis were an interest within the meaning of Rule 24, that interest would not be adversely affected by denial of the motion to intervene.

Fuqua remains free today to pursue its control of Avis. Since a majority (53%) of Avis stock is publicly held - and has been so held for over a year - Fuqua could purchase on the open market or by tender a majority, and hence controlling, interest in the company. Grant or denial of intervention does not affect this avenue to corporate control.

Moreover, even if it were somehow imperative that Fuqua reach its goal of control by purchasing the trustee's stock, denial of intervention does not obstruct that route. As a non-party, Fuqua is free to persuade the trustee and court to sell to it. If the trustee wishes to sell to Fuqua, it is irrelevant whether Fuqua is a party. If the trustee chooses not to sell to Fuqua, and sells instead to another purchaser

or to the public through a public offering, Fuqua's being a party by dint of intervention will still not give it any right to the stock. ^{8/} Norton Simon, to whom the trustee has announced he will seek court approval for a sale is not a party and has made no effort to become one.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING FUQUA'S MOTION FOR PERMISSIVE INTERVENTION

Permissive intervention is a matter within the trial court's discretion. Sutphen Estates, Inc. v. United States, 342 U.S. 19, 23 (1951). The district court did not abuse its discretion here. Rule 24(b)(2) requires the district court to consider whether the intervention would unduly delay matters. Permitting Fuqua to intervene would create an unacceptable risk of substantial further delay in divestiture

^{8/} As a party, Fuqua could appeal (and thus delay) a sale to some one else or to the public, but since the relevant issue in an antitrust divestiture is competition, with which Fuqua has no concern, an appeal would ultimately be fruitless. Fuqua appears to assume that as a result of Trustee Order No. 3 the trustee is obliged to sell publicly and may not make a private sale. The United States does not share this view of Trustee Order No. 3; we think that the order is permissive, not mandatory, with regard to a public sale. Judge Blumenfeld has not decided this question of interpretation. As explained above, this question is not significant here, for as a practical matter Fuqua's chances of purchasing the stock do not turn on that order.

proceedings already too long delayed. Intervention is unnecessary, as we have shown earlier, for Fuqua to be chosen as the buyer of the trustee's stock. Intervention would, however, grant Fuqua the status of a party and if it is not chosen, would enable it to appeal - and thus delay - the disposition of the stock ultimately made. As Judge Frankel stated in Ciba: such "prolongation of the suit has not been shown. . . to be desirable or justifiable. Absent such a showing, in an antitrust case brought by the United States, continuation of the litigation becomes by definition a course that 'will unduly delay or prejudice the adjudication of the rights of the original parties'." Ciba, supra, at 514.

CONCLUSION

For the foregoing reasons, the district court's denial of Fuqua's motion to intervene should be affirmed.

Respectfully submitted.

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